Nos. 80-1937, 80-1938, 80-1939

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IN THE

# Supreme Court of the United States

October Term, 1980

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FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

*Petitioners,*

*v.*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,

*Respondents.*

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**On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF CUSTOMER RESPONDENTS IN OPPOSITION

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## Questions Presented

The questions presented by the petitions for a writ of certiorari are:

1. Whether the Court of Appeals for the District of Columbia Circuit's holding that the Commission must observe the requirements of § 5(a) of the Natural Gas Act, 15 U.S.C. § 717d(a), when imposing a new rate structure of its own making, presents any important and novel question warranting review by this Court.

2. Whether the fact that a pipeline's long-standing rate structure originated from a settlement relieved the Commission of the duty to comply with § 5(a) before changing the constant elements of the rates by imposing a new rate structure of its own making.

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## BRIEF OF CUSTOMER RESPONDENTS IN OPPOSITION

Respondents The Brooklyn Union Gas Company, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company, National Fuel Gas Supply Corporation, Philadelphia Electric Company, Philadelphia Gas Works, Public Service Electric and Gas Company, and South Jersey Gas Company (the Zone 3 Customer Group)[1] file this brief in opposition to the petitions for a writ of certiorari

1. The list required by Rule 28.1 of the rules of this Court appears at Appendix A to this brief.

submitted on behalf of the Federal Energy Regulatory Commission (FERC or Commission) (No. 80-1937), the North Carolina Utilities Commission (NCUC) (No. 80-1938), and North Carolina Natural Gas Corporation, *et al.* (NC Cos.) (No. 80-1939).

## Opinions Below

The Zone 3 Customer Group adopts the description of the opinions below contained in FERC's Petition at 1. The opinion of the court of appeals is reported at 642 F.2d 1335.

## Jurisdiction

The Zone 3 Customer Group adopts the statement of jurisdiction contained in FERC's Petition at 1-2. By letter of July 16, 1981, the Clerk of this Court extended the time for filing responses to petitions for a writ of certiorari to and including July 31, 1981.

## Statutes Involved

The Zone 3 Customer Group adopts the statement as to statutes involved contained in FERC's Petition at 2.

## Statement of the Case

The petitions filed by FERC, NCUC, and NC Cos. seek review of the portion of the decision of the court of appeals that set aside a FERC opinion and order imposing a mileage formula reflecting only distance of haul for alloca-

tion of fixed transmission costs among sales zones on the natural gas pipeline system of Transcontinental Gas Pipe Line Corporation (Transco).[2] Transco has filed a cross-petition (No. 80-2143) seeking review of the portion of the court's decision that affirmed FERC's determination of the lawful return on equity capital for that pipeline.

These cases arise from a general systemwide rate increase filing made by Transco on July 30, 1976. In its filing, Transco reflected increases in a number of the components of its overall cost of service, including an increased rate of return on common equity. However, the filing proposed no change in the zone rate differentials,[3] which had formed a prominent part of Transco's rate structure since 1962.[4] The unmodified zone rate differentials neither

2. Transco's system has three sales zones. Zone 1 includes Mississippi, Alabama and Georgia; zone 2 includes South Carolina, North Carolina, Virginia and the District of Columbia; zone 3 includes Maryland, Pennsylvania, New Jersey, Delaware and New York.

3. The zone rate differentials govern the assessment of fixed transmission costs among sales zones. The historical rate differentials, at 100% load factor, are 3.6 cents per Dekatherm (Dth) between zones 3 and 2, and 2.8 cents per Dth between zones 2 and 1. FERC used Dth and Mcf (thousand cubic feet) interchangeably in its opinion. FERC Pet., App. F at 38a n.7. Load factor is the percentage relationship between average daily receipts of gas and total contract demands.

4. This basic rate structure, and the zoned rates which comprised its essential component, found their genesis in a 1962 rate case settlement. *Transcontinental Gas Pipe Line Corp.*, 27 F.P.C. 187 (1962). The zone rate differentials were employed continuously thereafter for cost allocation and rate design in all rate increase and rate reduction filings made by Transco. Prior to Transco's July 30, 1976 filing, no party challenged or even questioned the zone rate differentials, which had been continually incorporated in every Transco rate settlement, and formed a prominent feature of Transco's lawful rates, which were found "just and reasonable" on many occasions. Commission orders on Transco rate settlements and filings may be found at: Docket No.

*(footnote continued on next page)*

caused nor contributed to Transco's requirement for increased rates.

After suspension, Transco's increased rates became effective, subject to refund, on February 1, 1977. A settlement that resolved many of the issues presented by Transco's filing was approved by FERC order issued July 27, 1978, which order set the zone differential question for hearings and decision.[5]

After hearings, the Presiding Administrative Law Judge (ALJ) issued an initial decision, thoroughly analyzing the evidence of record, and finding and concluding that:

> Upon consideration of the record in this proceeding, including the briefs filed, it is concluded that the zone rate differentials filed as a component of Transco's rate increase application, are just, reasonable, nonpreferential and non-discriminatory, and should be continued in effect.[6]

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RP75-75, 8 Matthew Bender, Federal Power Service (FPS) 5-355 (1976); 54 F.P.C. 2150 (1975); 51 F.P.C. 1243 (1974); 46 F.P.C. 1411 (1971) (rates found "just and reasonable." *Id.* at 1413); 44 F.P.C. 1737 (1970) (no party raised issues "on matters of rate design"; rates found "just and reasonable." *Id.* at 1739); 42 F.P.C. 1279 (1969) (The Commission noted that no party, including the Staff, had raised issues "on matters of rate design," and specifically found that "the rates proposed by Transco are just and reasonable." *Id.* at 1281-82); 36 F.P.C. 431 (1966); 31 F.P.C. 1150 (1964).

5. The return on equity issue was addressed in a separate hearing. Transco Pet. at 4-5. While the Zone 3 Customer Group takes no position as to the proper rate of return for Transco, we believe the decision below on the rate of return issue is not inconsistent with the court's resolution of the zone differential issue, as to which Transco is in the position of a stakeholder. *See infra,* at 10 n.11.

6. FERC Pet., App. H at 62a. The ALJ considered and gave effect to each of the major cost-causing factors which the Commission had previously determined relevant to a proper allocation of trans-

*(footnote continued on next page)*

The ALJ also stated:

> In fact, a better case could be made for zone elimination than for Mcf-miles allocation, since 87 percent of fixed transmission costs are now allocated volumetrically.[7]

By its Opinion 59, FERC reversed the ALJ's decision, and without finding that Transco's unchanged zone rate differentials were unlawful or addressing the contrary findings of the ALJ,[8] ordered that transmission costs be prospectively allocated among rate zones by a strict Mcf-mile formula which gave exclusive weight to distance of haul only. The effect of this order was to increase the zone rate differential between Transco's sales zones 2 and 3 by more than 300%, and to impose virtually the entire rate increase allowed Transco on its zone 3 customers alone. FERC Pet., App. F at 41a.

Several parties sought rehearing, citing the material defects in FERC's decision. FERC, without discussion of the matters raised by the parties, issued a short "notice"

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mission costs among customers of an interstate pipeline: load distribution and relative size of markets, load factors, and distance of haul. *See Northern Natural Gas Co.*, 14 F.P.C. 11, 20-22 (1955), *aff'd sub nom. Interstate Power Co.* v. *FPC*, 236 F.2d 372 (8th Cir. 1956), *cert. denied*, 352 U.S. 967 (1957). He also recognized that the location of storage on Transco's system would preclude use of a strict mileage formula for allocation of costs, and that other elements of Transco's rate structure militated strongly against any increase in Transco's zone rate differentials. FERC Pet., App. H at 60a-61a.

7. FERC Pet., App. H at 61a-62a.

8. An agency's departure from the ALJ's findings is vulnerable if it fails to reflect "attentive consideration" to the ALJ's decision. *National Broadcasting Co.* v. *FCC*, 516 F.2d 1101, 1121 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 853 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

stating that applications for rehearing, and related requests for a stay, were "deemed denied." FERC Pet., App. G at 53a-54a.

The court of appeals issued a partial stay of Opinion 59, pending review at the request of the Zone 3 Customer Group and others.[9]

On review, the court held that FERC had exceeded its statutory authority in imposing the change in the zone rate differentials, reasoning that "[i]f the Commission seeks to make such changes, it has no alternative save compliance with the strictures of section 5(a)." FERC Pet., App. C at 33a. The court made it clear that FERC's failure to observe its statutory mandate was not harmless error, because FERC's non-compliance with § 5(a) "denies 'Transco's existing zone differentials the substantive consideration they deserved.'" FERC Pet., App. A at 12a.

The court also held that, even if FERC had observed its statutory mandate, major elements of its opinion were not supported by substantial evidence. FERC makes no claim that the court below erred in this respect.[10] This aspect

9. The court's order of December 11, 1979 allowed the higher rates mandated by Opinion 59 to Transco's sales zone 3 to become effective, and maintained the *status quo* as to sales zones 1 and 2. The increased charges to zone 3 customers have been held in escrow by Transco pursuant to the stay order, and will be made available to adversely affected consumers in sales zone 3 under the court's opinion.

10. Specifically, the court observed FERC's disregard, without reasoned analysis, of several factors justifying the existing rate structure, including *relative* economies of scale attributable to the 75% load concentration in sales zone 3, costs avoided through zone 3 storage operations, and evidence demonstrating that the existing rate structure was a more accurate reflection of cost incurrence. Moreover, the evidence of material defects in the mileage formula, *as applied to Transco,* had been ignored by FERC. Consequently, the court concluded that "the evidence of record supporting [FERC's] prescription falls short of substantiality." FERC Pet., App. A at 19a-21a.

of the court's opinion alone provides ample basis for the decision below.

FERC and others sought rehearing and rehearing *en banc* of the court's decision. No judge of the court of appeals requested a vote on the suggestions for rehearing *en banc*; accordingly, they were denied. Although the petitions for rehearing were also denied, the court amended its opinion to address a concern raised by FERC as to the scope of that opinion. FERC Pet., Apps. C, D, and E at 32a-35a.

## Reasons for Denying Writ

The decision below is a proper application of this Court's long-established interpretation of the Commission's limited rate-review functions under § 5(a) of the Natural Gas Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). As such, it presents no question warranting review.

Following this Court's precedents, the court of appeals held that the Commission had exceeded its statutory authority in ordering a change in the zone rate differentials in a pipeline's tariff—which the pipeline had not proposed to change—without first finding them unlawful. The court below also found that, regardless of FERC's failure to observe the standards of § 5(a), the essential elements of its order were not supported by substantial evidence. Application of these criteria for judicial review "is primarily the task of the courts of appeals." *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 309-310 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-792 (1968).

Contrary to FERC's stated apprehensions, settlements have not been discouraged by the decision of the court below. But even if this were the case, settlement procedures are properly shaped by a correct application of the law.

## I.

### This case presents no novel or important question of law.

1. The court of appeals held that the Commission may not itself change zone rate differentials, which the pipeline has not proposed to change, without first finding them unlawful. This is entirely consistent with this Court's holding in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956):

> The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be "unjust, unreasonable, unduly discriminatory, or preferential." This is neither a "rate-making" nor a "rate-changing" procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to the basic power, *in the case of a newly changed rate or contract* . . . , the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its

> order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remained the same—*to determine whether the rate fixed by the natural gas company is lawful.* (Emphasis added)

No party contends that the new zone rate differentials imposed by FERC's decision were "made in the first instance" by a natural gas company. The pipeline made no such proposal in its rate filing. Therefore, the procedures contemplated by § 5(a) of the Natural Gas Act had to be followed by the Commission before it could lawfully effect a change in these unchanged features of the rate.

There are several reasons why the courts have found it necessary to distinguish between "changed" and "unchanged" rates and rate structures. The "unchanged" rate is the filed rate. It has the effect of law. *See Arkansas Louisiana Gas Co.* v. *Hall,* 49 U.S.L.W. 4947 (July 2, 1981). It cannot be changed retroactively by the pipeline or the Commission. This legal framework assures the customers certainty and stability of rates and rate structures.

The pipeline may change a rate or rate structure prospectively, but only if it follows the filing procedures of § 4 of the Natural Gas Act, 15 U.S.C. § 717c. *Mobile,* 350 U.S. at 342. The Commission may allow the changed rates to become effective under § 4(e) without suspension, in which case they become the lawful rates. Or the Commission may suspend the rate change, thereby making the *increased rate* subject to refund if found not justified. The "Commission is empowered [under § 4(e)] to require the company to collect *the increment* under bond and account-

ing, and refund it if it could not make out its case *for the increase.*" *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 23 (1968) (emphasis added).[11]

This Court and lower courts have, on many occasions, recognized the distinction between § 4 and § 5 in the context of proposals to change the allocation provisions of pipeline tariffs. In *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 643-645 (1972), this Court held that enforcement of the anti-discrimination provisions of § 4(b), as to tariffs already effective and on file, required the Commission to proceed under § 5(a) to modify the pipeline's allocation practices. *Id.* at 643. Subsequently, in *American Smelting & Refining Co.* v. *FPC*, 494 F.2d 925, 940-941 (D.C. Cir.), *cert. denied*, 419 U.S. 882 (1974), the court of appeals stated specifically that the exercise of the Commission's authority under § 5(a) "is a two-step adjudicatory process: first, the Commission must find that an existing condition is unjust or discriminatory; second, the Commission must prescribe the remedy for that condition. Each step requires the Commission to draw a legal conclusion, *viz.*: the ille-

11. (Quoting from *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 146 (1960)). These decisions confirm the *Mobile* holding that the Commission's "supplementary" § 4(e) powers extend only to *changes* in "rates" or "classifications", and may not be used to modify retroactively that which the pipeline "in the first instance" has not proposed to change. The court of appeals' decision was entirely consistent with these principles—finding the burden was properly on Transco to justify its proposed *increased* rate of return, under § 4(e), and that FERC had the burden of demonstrating, under § 5(a), that the pipeline's *unchanged* zone rate differentials, which "were no part of [the pipeline's] argument for higher rates" (FERC Pet., App. A at 15a), were unlawful before instituting a change in the long-standing rate structure.

gality of an existing condition and the justness and reasonableness of the remedy."[12]

Where the Commission seeks to modify a pipeline's existing rate structure, the distinction between § 4 and § 5 has been consistently and uniformly recognized. In affirming a Commission order requiring revisions in a pipeline's tariff reflecting the allocation of transmission costs among its customers, the Court of Appeals for the Eighth Circuit explained that:

> [T]he Commission was obliged to recognize and permit [the pipeline's existing rate structure] unless and until it was proved by substantial evidence that [it was] unduly discriminatory.[13]

In its underlying *Northern* decision, the Commission had made it clear that "the initial question to be decided is not whether any of the zoning proposals are feasible, but, rather, *whether the present rate structure of Northern is*

12. *Accord, Sebring Utilities Comm'n* v. *FERC*, 591 F.2d 1003, 1013 (5th Cir.), *cert. denied*, 444 U.S. 879 (1979); City of *Willcox* v. *FPC*, 567 F.2d 394, 402 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978); *Southern Natural Gas Co.* v. *FPC*, 547 F.2d 826, 832 (5th Cir. 1977); *Louisiana* v. *FPC*, 503 F.2d 844, 861 (5th Cir. 1974). FERC attempts to bypass these decisions by characterizing them as "curtailment cases." FERC Pet. at 13 n.6. There is no distinction, concerning the issue presented here, between curtailment cases and rate cases. The former involve tariffs governing the allocation of gas; the latter involve tariffs governing the allocation of costs. The statutory standards applicable to each allocation practice are the same. The fact that the curtailment cases arise out of the Commission's *transportation* jurisdiction under section 1(b) of the Act, 15 U.S.C. § 717(b), does not alter this result. *See FPC* v. *Louisiana Power & Light Co.*, 406 U.S. at 636, 642-45.

13. *Interstate Power Co.* v. *FPC*, 236 F.2d 372, 387 (8th Cir. 1956), *aff'g Northern Natural Gas Co.*, 14 F.P.C. 11 (1955), *cert. denied*, 352 U.S. 967 (1957).

*unduly discriminatory or preferential.*" 14 F.P.C. at 18 (emphasis added). Contrary to FERC's representations to this Court (Pet. at 13-14), in every case involving proposals to change a pipeline's existing rate structure or allocation practices where the § 4-§ 5 issue has been squarely presented, the Commission has consistently applied § 5, not § 4.[14]

FERC argues (Pet. at 7) that, under the language of § 4(e) of the Natural Gas Act, the pipeline bears the burden of proof on "every aspect" of its new rates when it files under § 4(d). But that is not what the statute says. Section 4(e) provides in pertinent part: "At any hearing involving a rate or charge sought to be *increased*, the burden of proof to show that the *increased* rate or charge is just and reasonable shall be upon the natural gas company . . . ." (Emphasis added) The language of the statute makes it clear that it is only under § 5(a) that FERC is

14. *See, e.g., Hydrocarbon Transfers, Inc.*, Docket No. ST79-13-000, Order Denying Request for Hearing and Condition (Apr. 10, 1981) (Proceeding involving proposed new allocation of cost of high-priced gas supplies "is pursuant to Section 5 of the Natural Gas Act and can only have prospective application." *Mimeo* at 1); *United Gas Pipe Line Co.*, Docket No. RP78-68, Order Denying Rehearing (Aug. 8, 1980) (Commission rejected "claim that the Commission erred in ordering a hearing under section 5 only, rather than under both sections 4 and 5, and in concluding that any allocation change should be prospective only." *Mimeo* at 2), *petition for review pending sub nom. United Gas Pipe Line Co.* v. *FERC*, No. 80-1850 (5th Cir.); *United Gas Pipe Line Co.*, Docket No. RP72-133, 18 FPS 5-279 (July 18, 1979) (Commission found pipeline's method of allocating emergency gas costs "unjust, unreasonable, unduly discriminatory, and preferential, in violation of section 5 . . . ." *Id.* at 5-279. Commission recognized that relief could be prospective only. *Id.* at 5-280), *aff'd sub nom. United Gas Pipe Line Co.* v. *FERC*, No. 79-3209 (5th Cir. July 6, 1981); *Michigan Wisconsin Pipe Line Co.*, 34 F.P.C. 621, 624, 627 (1965); *Id.* at 634-35, 655 (initial decision).

empowered to modify unchanged elements of the pipeline's rate structure. Section 5(a) provides in pertinent part that, upon a finding that

> any rate, charge, or classification . . . , rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, or unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be *thereafter observed and in force*, and shall fix the same by order . . . . (Emphasis added)

Thus, the court below was simply applying existing law when it held:

> The Commission contends that it need not observe section 5(a) procedures because this case was commenced by Transco's filing for higher rates under section 4(e), which places the burden of proof upon the petitioner. But section 4(e) places upon the petitioner the burden of justifying its higher rates only when the petitioner has proposed an increase in rates. Therefore, we agree that Transco had the burden of proof on the rate of return question, but we cannot accept the proposition that because a company files for higher rates, it bears the burden of proof on those portions of its filing that represent no departure from the status quo.[15]

The unchanged zone rate differentials employed by Transco represented no departure from the *status quo*, for they had been reflected continuously in the pipeline's rates for some fourteen years prior to its filing.

2. Reliance by FERC (Pet. at 9) on this Court's *Ayrshire* decision,[16] to advance its view that the Natural

15. FERC Pet., App. A at 15a.

16. *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949).

Gas Act does not recognize the changed-unchanged dichotomy, is simply misplaced. FERC cites an excerpt from that decision which it claims is in support of its position. But a more complete quotation from this Court's opinion in *Ayrshire*[17] makes it clear that the legislation administered by the Interstate Commerce Commission *did* recognize a procedural distinction between cases in which the Commission was faced with rate changes proposed by a carrier and circumstances where the agency desired to change a rate which the carrier did not propose to change. This is entirely consistent with the decision below.

FERC's claim (Pet. at 12) that the decision below is inconsistent with this Court's holding in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) is equally misplaced. In the instant case, the pipeline proposed no change in its long-standing method of cost allocation, while in *Tennessee* the pipeline had filed a change in the method of cost allocation among its sales zones.[18] Moreover, in con-

17. "It seems too plain for argument that such broad authority is ample for the modification of either proposed or existing rates or both. The power granted the Commission under § 15(1) to deal with rate schedules already effective supports that view. *For once the Commission finds the rate to be unjust or unreasonable or unjustly discriminatory or unduly prejudicial or otherwise unlawful, the Commission is granted the power under § 15(1) to determine and prescribe the just and reasonable rate.*" 335 U.S. at 582-83 (emphasis added). This omission alone, accomplished via ellipsis in FERC's petition, highlights the bankruptcy of FERC's belated "Interstate Commerce Commission" argument, which appeared for the first time in its petition to this Court. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 37 (1976).

18. As the underlying decision makes clear, Tennessee had departed from the historical rate relationships by giving 50% weight to a new Mcf-mile allocation in the rate filing at issue. *Tennessee Gas Transmission Co.*, 27 F.P.C. 202, 230 (1962) (initial decision).

*(footnote continued on next page)*

trast to Transco's long-standing rate structure, Tennessee's rates did not reflect settled practice, and had never been approved, decided or agreed to,[19] a fact explicitly recognized by this Court (*Id.* at 147-148):

> [Tennessee] has since the early 1950's, with Commission approval, divided its extensive pipeline system into six rate zones with rate differentials. *The appropriate allocations of its costs of service among these zones and types of customers was not decided by the Commission nor agreed upon between the parties, but was left for future decision. It was in this posture that in 1959 Tennessee Gas, pursuant to section 4(d) of the Natural Gas Act, filed with the Commission proposed increased rates for its six rate zones.* (Emphasis added, citations omitted)

This Court, therefore, properly found that the pipeline had the burden of supporting its own new method of cost allocation in a § 4 filing. *Id.* at 152. The decision below is in no way inconsistent with that view.

FERC cites other cases (Pet. at 13 n.7 and at 14 n.8) in support of its contention that it has consistently interpreted its § 4(e) authority to apply to "each and every element" of a pipeline's rates.[20] These cases are thor-

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Moreover, as the Commission explained in deciding the rate structure issues, the allocation method approved would be applicable "for the future," and it was "immaterial whether the applicant, Tennessee, had sustained its alleged burden of proof on the issue as originally presented." 27 F.P.C. at 206. Undoubtedly, it was for this reason that the § 4-§ 5 issue was never squarely presented in the *Tennessee* case.

19. *See* the underlying decision in *Tennessee Gas Transmission Co.* v. *FPC*, 293 F.2d 761, 763 (5th Cir. 1973).

20. FERC Pet. at 13. The basic premise of this argument is incorrect. *See supra*, at 11-12 and at 12 n.14.

oughly unpersuasive as a decisional guide for resolution of the issue before this Court. In virtually every case cited, the § 4-§ 5 issue was neither raised nor discussed by the Commission. In the only two cases where the § 4-§ 5 issues was addressed, and considered on judicial review, the reviewing courts reached decisions consistent with that of the court below.[21]

3. Aside from FERC's failure to follow the statutory procedures of § 5(a), the court below found that FERC's order was not supported by substantial evidence. Specifically, the court determined that FERC: (1) provided no reasoned explanation for its departure from Transco's long-standing allocation practice (FERC Pet., App. A at 17a-18a); (2) ignored entirely, or dismissed without ade-

21. In *Kansas-Nebraska Natural Gas Co.* v. *FPC*, 534 F.2d 227 (10th Cir. 1976), on facts virtually identical to those in *Tennessee*, the court affirmed a Commission order under § 4(e) which subjected a pipeline to refunds resulting in "undercollections". As with *Tennessee*, however, the pipeline's filing under § 4 proposed a *new* cost allocation methodology, thus representing a "departure from the status quo," and triggering the application of § 4(e) to the changed allocation method. *See Kansas-Nebraska Natural Gas Co.*, 53 F.P.C. 1691, 1727-1728 (1975).

In *Texas Gas Transmission Corp.* v. *FERC*, No. 79-1385 (D.C. Cir. Feb. 13, 1981), the court, consistent with the decision in the instant case, reversed a Commission order which modified, without the requisite § 5(a) findings, the production cost allocation methodology which was utilized in the pipeline's § 4 filing and *which represented no departure from the methodology previously employed.*

In *Columbia Gas Transmission Corp.* v. *FERC*, 628 F.2d 578 (D.C. Cir. 1979), neither the court nor the Commission discussed the applicability of § 5(a). However, the court reversed a Commission opinion ordering a departure from a long-standing costing methodology, as unsupported by substantial evidence. The court below relied on *Columbia* in holding that the Commission had failed to marshal substantial evidence to support its decision, regardless of whether it observed the standards of § 5. FERC Pet., App. A at 17a-21a.

quate explanation, cost evidence supporting the existing rate structure (FERC Pet., App. A at 18a-20a); and (3) provided no basis for its refusal to address the substantial evidence of material defects in the mileage formula it imposed (FERC Pet., App. A at 20a).[22] The court's conclusion that essential elements of FERC's "prescription" were not supported by substantial evidence (FERC Pet., App. A at 21a) provides a valid independent ground for denying the petitions.[23]

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22. NC Cos. alone contend (Pet. at 27) that the court's review of the record was selective. This claim is in direct conflict with the court's detailed discussion of the competing contentions of the parties respecting the factual matters at issue. *See* FERC Pet., App. A at 17a-20a. Such a review of the evidence is a function particularly suited to the court of appeals and does not warrant the intervention of this Court. *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 309-310 (1974); *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

23. FERC raises no issue as to the specific relief granted by the court below. NC Cos.' reliance (Pet. at 26) on *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952) is misplaced. In contrast to the facts in *Idaho Power*, the FERC order here was unsupported by substantial evidence. Accordingly, that order could not be reinstituted even if FERC's "error of law" were subsequently remedied by the requisite statutory findings. A remand therefore would be a purely idle and useless formality, entailing unnecessary delays in returning to consumers the monies held in escrow pursuant to the court's stay order. NCUC's citation (Pet. at 9) of *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978) is similarly misplaced. In *Vermont Yankee*, this Court found that the reviewing court had improperly imposed *its own notion* of proper procedural requirements where the procedures being followed by the agency in a rulemaking fully met the standards set by Congress. In the instant adjudicatory case, the procedures of § 5(a) were prescribed *by Congress*, not the courts, and, in the words of the court below: "If the Commission seeks to make such changes, it has no alternative save compliance with strictures of section 5(a)." FERC Pet., App. C at 33a.

## II.

**The fact that the long-standing zone rate differentials had their genesis in settlement does not alter the Commission's statutory responsibilities.**

The Commission approved Transco's zone rate differentials by a series of orders going back to 1962. In several instances, the matter was brought before the Commission in settlements designed, upon approval, to terminate litigation arising from a rate filing by the pipeline. The settlements contained disclaimers to the effect that adherence thereto would not be construed as support for any particular principle of rate-making or rate design.[24]

FERC contends (Pet. at 16) that the court of appeals treated the 1962 settlement which initially reflected Transco's existing zone rate structure "as having the force and effect of precedent." Aside from the fact that the court below made no such finding, the mere fact that the unmodified rate structure came into being initially via settlement[25] does not relieve FERC of its responsibility to

24. In each instance, the Commission approved the rates and, in so doing, gave its stamp of approval to the zone rate differentials reflected in the published rates. This was approval of a zone rate differential, not a mere "numerical relationship" deriving its sole vitality from a rate settlement, as the Commission (Pet. at 16) suggests. It is the end result of the Commission's action which determines its legality. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). The Commission was not faced in those earlier cases with the need to approve a cost allocation or rate design principle not apparent in the published rate.

25. Rates and rate structures may find their genesis in initial rates authorized under § 7 of the Natural Gas Act, 15 U.S.C. § 717f, rates reflected in approved settlements, increased or reduced rates filed under § 4 and made effective without suspension or litigation, or rates promulgated after hearings under § 4 or § 5 (either with or without controverted rate structure issues).

act under § 5(a) if it seeks to impose a new rate structure of its own making. The court of appeals gave Transco's long-standing rate differentials no more or less "precedential effect" than would be given those of any other regulated company which sought no change in its existing rate relationships.[26]

## III.

### Rate settlements before the Commission are not adversely affected by the decision below.

The Natural Gas Act does not address settlements; they obtain no legal status from that statute. Settlement procedures have developed over the years as a device to overcome the delays inherent in Commission proceedings by placing before the Commission an agreement which contains results that do not offend the standards of the Act.

The proposition that settlements contribute to administrative efficiency (FERC Pet. at 17-18) is a truism. The supposition that the decision below will "likely deter settlement" and "have the effect of encouraging full-scale

26. The only "precedential effect" accorded such rate structures is that, if FERC seeks to impose its own rates, it must find the existing rate structure unlawful. This does not diminish the value of the settlement disclaimer. The parties to the settlement and the Commission remain free to challenge the zone rate structure in a subsquent rate proceeding. Nonetheless, and aside from the provisions of the Natural Gas Act, it is well established that a party which seeks to change a current practice bears the burden of proof to support the new practice which it advocates. *See* Administrative Procedure Act § 7(d), 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *Environmental Defense Fund* v. *E.P.A.*, 548 F.2d 998, 1012-1015 (D.C. Cir. 1976) (supp. op. on reh'g), *cert. denied*, 431 U.S. 925 (1977).

adjudication of all rate issues" (*Id.* at 18) is not factually supported by FERC.

In sharp contrast to this speculation, a more accurate assessment of the impact of the decision below on the settlement process was presented by FERC on brief to the court of appeals. In support of its own decision *against* retroactive changes in Transco's rate structure (*see* FERC Pet., App. F at 50a-52a), FERC explained:

> In addition, a requirement of retroactivity could deter settlements on fundamental rate issues. Rather than risk retroactive liability—by FERC plugging new rate designs into a framework otherwise settled some time ago—a pipeline might well refuse to agree on anything, and continue to contest all issues. FERC Brief at 58.

The decision below is in full accord with both these practicalities of the settlement process and the routine practice of party litigants of providing *by settlement* that rate structures may be modified prospectively only—*a practice consistent with § 5(a) and designed to facilitate settlements and prompt refunds.*[27]

27. *See, e.g., Great Lakes Gas Transmission Co.*, Docket No. RP79-10, Order on Stipulation (Mar. 31, 1980) ("Any change in cost allocation or rate design methodology shall be effective prospectively . . . ." *Mimeo* at 2); *El Paso Natural Gas Co.*, Docket No. RP76-59 (Rate Design), Order Approving Settlement (June 2, 1977) ("any party other than El Paso shall have the right, in any El Paso general rate increase proceeding subsequent to RP77-18 or in any proceeding initiated under Section 5 of the Natural Gas Act to raise a rate design issue; provided, however, that any Commission decision in any such proceeding shall not become effective prior to January 1, 1980, or the date of the Commission's order, whichever is later." *Mimeo* at 2); *Consolidated Gas Supply Corp.*, Docket No. RP73-107, Op. No. 819, 13 FPS 5-561 (Aug. 12, 1977) ("the settlement provided for . . . prospective determination of the reserved issues,"

*(footnote continued on next page)*

Actual experience shows that FERC's apprehension concerning potential adverse impacts on settlements is unfounded. The decision below was issued on September 24, 1980; the *Columbia* decision,[28] which similarly required a reasoned explanation for any departure from a settled cost allocation practice, was issued on May 17, 1979. Any resultant adverse impacts on the flow of settlements to the Commission should long since have become evident. Yet, as shown by Appendix B to this brief, the number of settlements submitted to the Commission in the past year has *increased* by some 28%.[29]

FERC's "settlement impact" claim is without substance, and presents no question warranting this Court's attention.

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*mimeo* at 1); *Great Lakes Gas Transmission Co.*, Docket No. RP75-94, Order Approving Settlement (Aug. 31, 1976) ("the rate design issue is reserved for further proceedings, the resolution thereof to become effective prospectively only," *mimeo* at 2); *Trunkline Gas Co.*, 54 F.P.C. 138, 139 (1975); *Texas Gas Transmission Corp.*, 54 F.P.C. 1501, 1502 (1975); *Texas Eastern Transmission Corp.*, 54 F.P.C. 2174, 2175 (1975); *Natural Gas Pipe Line Co. of America*, 52 F.P.C. 652, 656 (1974).

28. *Columbia Gas Transmission Corp.* v. *FERC*, 628 F.2d 578 (D.C. Cir. 1979).

29. Manifestly, a clear-cut and correct statement of the law constitutes an inducement to settlements by reducing the areas of dispute. The decision below is clear and consistent with established precedent and practice. FERC would introduce doubt and confusion. That cannot be conducive to sound regulatory policy or efficient administrative process. *Cf.* FERC Pet. at 11.

## Conclusion

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

THE BROOKLYN UNION GAS COMPANY
CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
ELIZABETHTOWN GAS COMPANY
NATIONAL FUEL GAS SUPPLY CORPORATION
PHILADELPHIA ELECTRIC COMPANY
PHILADELPHIA GAS WORKS
PUBLIC SERVICE ELECTRIC AND GAS COMPANY
SOUTH JERSEY GAS COMPANY

By: JOSEPH P. STEVENS

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July, 1981

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# APPENDICES

## APPENDIX A

### Listing Pursuant to Rule 28.1

In accordance with Rule 28.1, Respondents The Brooklyn Union Gas Company, Consolidated Edison Company of New York, Inc., Elizabethtown Gas Company, National Fuel Gas Supply Corporation, Philadelphia Electric Company, Philadelphia Gas Works, Public Service Electric and Gas Company, and South Jersey Gas Company, state that they have the following parent, subsidiary, and affiliated corporations:

The Brooklyn Union Gas Company has subsidiaries Honeoye Storage Corporation, Boundary Gas Corp., and affiliate Fuel Resources Gathering Inc.

Consolidated Edison Company of New York, Inc. has subsidiaries Honeoye Storage Corporation and Boundary Gas Corp.

Elizabethtown Gas Company is a subsidiary of National Utilities and Industries Corp. and has affiliates Utility Propane Co., National Gas Gathering Co., National Energy Leasing Co., National Exploration Co., National Enerdrill Corp., and Lenape Resources Corp.

National Fuel Gas Supply Corporation is a subsidiary of National Fuel Gas Supply Company and has affiliates National Fuel Gas Distribution Corp. and Seneca Resources Corp.

Philadelphia Electric Company has affiliates Adwin Equipment Co., Adwin Realty Co., and The Susquehanna Power Co.

South Jersey Gas Company is a subsidiary of South Jersey Industries, Inc., and has affiliates South Jersey Energy Co., Energy and Minerals, Inc., Jesse T. Morie & Son, Inc., Delaware Valley Industrial Gases, Inc., South Jersey Fuels, Inc., and South Jersey Exploration Co.

## APPENDIX B

## FERC Response to Information Request

[LETTERHEAD OF]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON 20426

June 25, 1981

Mr. Gary E. Guy
Cullen and Dykman
1019 Nineteenth Street, N. W.
Washington, D. C. 20036

Dear Mr. Guy:

In response to your question on the number of settlements filed with the Commission, our records begin on June 15, 1979, the effective date of the order instituting the new settlement procedures.

From that date through June 14, 1980, 140 settlements were filed. From June 15, 1980 through June 14, 1981, 179 settlements were filed.

Very truly yours,

/s/ LOIS D. CASHELL
Lois D. Cashell
Assistant Secretary